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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Gregory Richard Rohrbach,

10 Plaintiff,

11 v.

12 Commissioner of the Social Security
13 Administration,

14 Defendant.

No. CV-17-08119-PCT-JJT

ORDER

15 At issue is the denial of Plaintiff Gregory Richard Rohrbach's Application for
16 Supplemental Security Income Benefits by the Social Security Administration ("SSA")
17 under the Social Security Act ("the Act"). Plaintiff filed a Complaint (Doc. 1) with this
18 Court seeking judicial review of that denial, and the Court now addresses Plaintiff's
19 Opening Brief (Doc. 12, "Pl.'s Br."), Defendant Social Security Administration
20 Commissioner's Opposition (Doc. 13, "Resp."), and Plaintiff's Reply (Doc. 16, "Reply").
21 The Court has reviewed the briefs and Administrative Record (Doc. 9, R.) and now reverses
22 the Administrative Law Judge's decision (R. at 19–31) as upheld by the Appeals Council
23 (R. at 14–17).

24 **I. BACKGROUND**

25 Plaintiff filed an application for Supplemental Security Income Benefits on
26 March 18, 2013, for a period of disability beginning April 20, 2009. (R. at 22.) Later,
27 Plaintiff amended the onset date to April 1, 2013. (R. at 22.) Plaintiff's claim was denied
28 initially on August 14, 2013 (R. at 22), and on reconsideration on February 11, 2014 (R. at

1 22.) Plaintiff then testified at a video hearing held before an Administrative Law Judge
2 (“ALJ”) on December 8, 2015. (R. at 22.) On February 22, 2016, the ALJ denied Plaintiff’s
3 Application. (R. at 31.)¹ On December 7, 2016, the Appeals Council denied a request for
4 review of the ALJ’s decision. (R. at 14–17.)

5 The Court has reviewed the medical evidence in its entirety and finds it unnecessary
6 to provide a complete summary here. The pertinent medical evidence will be discussed in
7 addressing the issues raised by the parties. In short, upon considering the medical records
8 and opinions, the ALJ evaluated Plaintiff’s disability based on the following alleged
9 impairments: osteoarthritis of the right knee, history of knee surgeries (1980’s), status post
10 cervical laminectomy (1980’s), history of shoulder surgeries, carpal tunnel syndrome,
11 obesity, lumbar and cervical degenerative disc disease and spondylosis, hypertension, and
12 obstructive sleep apnea. (R. at 25.)

13 Ultimately, the ALJ determined that Plaintiff is not disabled because while
14 Plaintiff’s alleged impairments “could reasonably be expected to cause some of the alleged
15 symptoms . . . [his] statements concerning the intensity, persistence and limiting effects of
16 these symptoms are not entirely credible.” (R. at 27.) The ALJ found that Plaintiff is unable
17 to perform his past relevant work as a painter but has the residual functional capacity
18 (“RFC”) for light unskilled work available in the national economy. (R. at 30.)

19 **II. LEGAL STANDARD**

20 In determining whether to reverse an ALJ’s decision, the district court reviews only
21 those issues raised by the party challenging the decision. *See Lewis v. Apfel*, 236 F.3d 503,
22 517 n.13 (9th Cir. 2001). The court may set aside the Commissioner’s disability
23 determination only if the determination is not supported by substantial evidence or is based
24 on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is

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26 ¹ The ALJ notes that Plaintiff applied for benefits once before and was denied by an
27 ALJ on October 25, 2012. (R. at 22.) While “specific consideration must be given to the
28 res judicata effect of [the] prior decision, . . . [which] gave rise to a presumption that
[Plaintiff] continued to not be disabled,” the ALJ correctly points out that Plaintiff
“rebutted the presumption of continuing disability due to a change in age category.” (R. at
22.)

1 more than a scintilla, but less than a preponderance; it is relevant evidence that a reasonable
2 person might accept as adequate to support a conclusion considering the record as a whole.
3 *Id.* To determine whether substantial evidence supports a decision, the court must consider
4 the record as a whole and may not affirm simply by isolating a “specific quantum of
5 supporting evidence.” *Id.* As a general rule, “[w]here the evidence is susceptible to more
6 than one rational interpretation, one of which supports the ALJ’s decision, the ALJ’s
7 conclusion must be upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002)
8 (citations omitted).

9 To determine whether a claimant is disabled for purposes of the Act, the ALJ
10 follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the burden of
11 proof on the first four steps, but the burden shifts to the Commissioner at step five. *Tackett*
12 *v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ determines whether
13 the claimant is presently engaging in substantial gainful activity. 20 C.F.R. §
14 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. *Id.* At step two,
15 the ALJ determines whether the claimant has a “severe” medically determinable physical
16 or mental impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If not, the claimant is not disabled
17 and the inquiry ends. *Id.* At step three, the ALJ considers whether the claimant’s
18 impairment or combination of impairments meets or medically equals an impairment listed
19 in Appendix 1 to Subpart P of 20 C.F.R. Part 404. 20 C.F.R. § 404.1520(a)(4)(iii). If so,
20 the claimant is automatically found to be disabled. *Id.* If not, the ALJ proceeds to step four.
21 *Id.* At step four, the ALJ assesses the claimant’s RFC and determines whether the claimant
22 is still capable of performing past relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). If so, the
23 claimant is not disabled and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and
24 final step, where he determines whether the claimant can perform any other work in the
25 national economy based on the claimant’s RFC, age, education, and work experience. 20
26 C.F.R. § 404.1520(a)(4)(v). If so, the claimant is not disabled. *Id.* If not, the claimant is
27 disabled. *Id.*

1 **III. ANALYSIS**

2 Plaintiff raises two arguments for the Court’s consideration: (1) the ALJ erred by
3 improperly discounting the opinions of Plaintiff’s treating physician; and (2) the ALJ erred
4 by discrediting Plaintiff’s symptom testimony. (Pl.’s Br. at 1.)

5 **A. The ALJ Erred by Giving Little Weight to the Opinions of Plaintiff’s**
6 **Treating Physician Without Providing Specific and Legitimate Reasons,**
7 **Supported by Substantial Evidence, for Her Decision**

8 While “[t]he ALJ must consider all medical opinion evidence,” there is a hierarchy
9 among the sources of medical opinions. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th
10 Cir. 2008). Those who have treated a claimant are treating physicians, those who examined
11 but did not treat the claimant are examining physicians, and those who neither examined
12 nor treated the claimant are nonexamining physicians. *Lester v. Chater*, 81 F.3d 821, 830
13 (9th Cir. 1995). “As a general rule, more weight should be given to the opinion of a treating
14 source than to the opinion of doctors who did not treat the claimant.” *Id.*

15 Given this hierarchy and a treating physician’s position at the top if it, if the treating
16 physician’s evidence is controverted by a nontreating or nonexamining physician, the ALJ
17 may disregard it only after “setting forth specific, legitimate reasons for doing so that are
18 based on substantial evidence in the record.” *Murray v. Heckler*, 722 F.2d 499, 502 (9th
19 Cir. 1983). “The ALJ can meet this burden only by setting out a detailed and thorough
20 summary of the facts and conflicting clinical evidence, stating his interpretation thereof,
21 and making findings.” *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989); *see also*
22 *Embrey v. Bowen*, 849 F.2d 418, 421–22 (9th Cir. 1988) (“The ALJ must do more than
23 offer his conclusions. He must set forth his own interpretations and explain why they, rather
24 than the doctors’, are correct.”). Normally, “[t]he opinion of a nonexamining physician
25 cannot by itself constitute substantial evidence that justifies the rejection of the opinion of
26 . . . a treating physician.” *Lester*, 81 F.3d at 831.

27 Here, Plaintiff’s two treating physicians reported that Plaintiff has severe physical
28 restrictions. Dr. Narayanaswamy Deepak found that Plaintiff could sit for 15 to 30 minutes
 at a time and one to two hours total. (R. at 28.) Dr. Deepak also opined that Plaintiff could

1 stand or walk for two hours of an eight-hour workday, could lift or carry five pounds
2 occasionally, and could never squat, crawl, climb, or reach. (R. at 28.) Similarly, Dr. Nimfa
3 Aguila found that Plaintiff could sit for 30 minutes at a time and for a total of two hours in
4 an eight-hour day and could stand or walk for two hours during that time. (R. at 28.) Dr.
5 Aguila opined that Plaintiff could frequently lift or carry five pounds and occasionally six
6 to twenty pounds. (R. at 28.) When presented with Dr. Deepak’s assessment, the VE found
7 that Plaintiff could not sustain full-time employment. (R. at 98.) The VE found the same
8 when presented with Dr. Aguila’s diagnosis. (R. at 98.)

9 The ALJ assigned “minimal weight to the opinions of Dr. Deepak and Dr. Aguila,
10 as the course of treatment is not what would be expected given the limitations proposed by
11 these medical sources.” (R. at 28.) The ALJ found the treating physicians’ opinions
12 unreliable because Plaintiff “consistently reported that his pain improved with medications
13 and the record overall does not contain significant physical examinations substantiating
14 limitations beyond those assessed in this decision.” (R. at 28.) The ALJ did not provide
15 any further reasons to reject the testimony of Dr. Deepak and Dr. Aguila.

16 On the other hand, the ALJ assigned “partial weight” to the opinions of two
17 nonexamining agency reviewers. (R. at 29.) One reviewer found “no change in [Plaintiff’s]
18 circumstances” since the denial of his 2012 application and affirmed that denial, and the
19 other found that Plaintiff could lift or carry 50 pounds occasionally and 25 pounds
20 frequently, could stand or walk for six hours and sit for six hours of an eight-hour day,
21 leading her to “assess[] [Plaintiff] with a medium [RFC].” (R. at 29.) The ALJ found that
22 “[w]hile the [RFC] assessed herein is more restrictive, [the nonexamining physicians’]
23 opinions support the conclusion that the claimant is not precluded from all work.” (R. at
24 29.)

25 These opinions of the two desktop reviewers contradict the testimony of Plaintiff’s
26 treating physicians.² Thus, the ALJ was required to provide specific and legitimate reasons,

27 ² In his opening brief, Plaintiff suggests that because the desktop reviewers found
28 Plaintiff to be partially—but not completely—disabled, that their testimony does not
directly contradict the findings of the treating physicians. (Pl.s Br. at 10–11.) In his Reply,

1 supported by substantial evidence, to reject the examining physicians' testimony. The
2 Court finds that the ALJ failed to do so.

3 The ALJ must have relied upon more than the contradictory opinions of two desktop
4 reviewers, whose opinions on their own cannot constitute substantial evidence sufficient
5 to reject the testimony of treating physicians. *Lester*, 81 F.3d at 831. But it is not clear what
6 evidence the ALJ did rely on, other than the fact that Plaintiff reported his pain had
7 improved with medication, because the ALJ otherwise cites generally to "the evidence of
8 record, as discussed herein," and "the record overall." (R. at 28.) *See Garrison v. Colvin*,
9 759 F.3d 995, 1012 (9th Cir. 2014) (finding the ALJ "errs when he rejects a medical
10 opinion or assigns it little weight [by] criticizing it with boilerplate language that fails to
11 offer a substantive basis for his conclusion."). And while "we will not fault the agency
12 merely for explaining its decision with less than ideal clarity, we still demand that the
13 agency set forth the reasoning behind its decisions in a way that allows for meaningful
14 review." *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (internal quotations
15 and citations omitted).

16 The Court is not within its power to speculate about what evidence led the ALJ to
17 her conclusion—especially because much of her preceding opinion deals with the
18 credibility of Plaintiff's testimony, and not a thorough review of his various diagnoses. *See*
19 *id.* (finding that where the ALJ fails to provide specific reasons for discrediting claimant
20 testimony, the "reviewing court will be unable to review those reasons meaningfully
21 [because the court] cannot engage in [] substitution or speculation.") (internal quotations
22 and citations omitted). Lacking any specific and legitimate reasons to do so, the ALJ erred
23 in rejecting the testimony of Plaintiff's treating physicians.

24 When counsel posed hypotheticals to the VE that incorporated the limitations set
25 forth by Dr. Deepak and Dr. Aguila, the VE concluded that a person with those limitations
26 could perform no work. (R. at 98–99.) Had the ALJ properly incorporated the findings of

27 Plaintiff seems to concede that the desktop reviewers contradict the treating physicians and
28 instead argues that the ALJ lacked specific and legitimate reasons to reject the treating
physicians' testimony (Reply at 2–3), and the Court finds that the difference between the
two sets of opinions is sufficient to constitute contradictory evidence.

1 Plaintiff's treating physicians, she would have been compelled to conclude that Plaintiff is
2 disabled under the Act. The Court thus need not examine the other grounds for reversal
3 raised by Plaintiff.

4 **B. The Credit-as-True Rule Applies**

5 Plaintiff asks that the Court apply the "credit-as-true" rule, which would result in
6 remand of Plaintiff's case for payment of benefits rather than for further proceedings. (Pl.'s
7 Br. at 19–20.) The credit-as-true rule only applies in cases that raise "rare circumstances"
8 which permit the Court to depart from the ordinary remand rule under which the case is
9 remanded for additional investigation or explanation. *Treichler v. Comm'r of Soc. Sec.*
10 *Admin.*, 775 F.3d 1090, 1099-1102 (9th Cir. 2014). These rare circumstances arise when
11 three elements are present. First, the ALJ must have failed to provide legally sufficient
12 reasons for rejecting medical evidence. *Id.* at 1100. Second, the record must be fully
13 developed, there must be no outstanding issues that must be resolved before a
14 determination of disability can be made, and the Court must find that further administrative
15 proceedings would not be useful. *Id.* at 1101. Further proceedings are considered useful
16 when there are conflicts and ambiguities that must be resolved. *Id.* Third, if the above
17 elements are met, the Court may "find[] the relevant testimony credible as a matter of law
18 . . . and then determine whether the record, taken as a whole, leaves 'not the slightest
19 uncertainty as to the outcome of [the] proceeding.'" *Id.* (citations omitted).

20 In this case, the credit-as-true rule applies. As the Court discussed above, the ALJ
21 failed to provide legally sufficient reasons for rejecting the opinions of the examining
22 physicians. If this evidence is properly credited, the Court sees no significant conflicts or
23 ambiguities that are left for the ALJ to resolve. Moreover, considering the record as a
24 whole, the Court is left with no doubt that Plaintiff is disabled under the Act. *See Garrison*
25 *v. Colvin*, 759 F.3d at 1022-23; *Lingenfelter v. Astrue*, 504 F.3d 1028, 1040-41 & n.12 (9th
26 Cir. 2007).

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